To Be Argued By
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Time Required:
15 Minutes

STATE OF NEW YORK
APPELLATE DIVISION

SUPREME COURT
FOURTH DEPARTMENT

GAY ALLIANCE OF GENESEE VALLEY, INC.,

Respondent,

-v-

CITY ASSESSOR, CITY OF ROCHESTER,
NEW YORK,

Appellant.

APPELLANT'S REPLY BRIEF

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STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION FOURTH DEPARTMENT

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APPELLANT'S REPLY BRIEF

A. GAGV'S INCORRECT FACTUAL ASSERTIONS.

The respondent Gay Alliance of the Genesee Valley, Inc. (GAGV) makes certain factual assertions in its brief that warrant comment.

The GAGV asserts that the City several times "changed its tune" during the course of this lawsuit regarding the City's reasons for denying the GAGV a tax exemption (Respondent's Brief, p. 8, 10). In fact, the City was only responding to the changing claims of the GAGV.

In its initial exemption application, the GAGV sought exemption only in the category "educational" (R.317); the City responded that it did not meet the requirements of "educational" (R.325-26). When the GAGV appealed to the Board of Assessment

Review, however, it sought exemption under an "assortment of purposes", including charitable, educational, and moral and mental improvement, as set forth in the Symphony Space case (R.333); the City responded by distinguishing the GAGV from the Symphony Space organization (R.235-36). When the GAGV asked why certain neighborhood associations had been granted an exemption when it had been denied an exemption, the City responded that those organizations had been found to qualify as "charitable" because they used government or donated funds to provide services to low-income persons and families (R.271), something that the GAGV clearly did not do.

None of these responses on the part of the City is inconsistent with the others. They merely address the changing claims and arguments made by the GAGV at different stages of this case.

The GAGV also asserts that the City has in the past granted tax exemptions to organizations similar to the GAGV. It states that the City has a "steadfast practice" of granting exemptions to other advocacy organizations (Respondent's Brief, p.4), and that it, the GAGV, had produced "extensive evidence" proving that fact (Respondent's Brief, p.9). The court below agreed with the GAGV, and found that the City had granted past exemptions to organizations similar to the GAGV (R.21-22, 24-25). In fact, however, there is virtually no credible evidence in the Record

that demonstrates such a practice on the part of the City.

The City has consistently denied that it has ever granted an exemption to an organization with a primary advocacy focus such as the GAGV, and it has asserted that the GAGV is different from the organizations to which it has granted exempt status. The "extensive evidence" cited by the GAGV which purports to contradict the City's statements consists of a list of names of organizations that have been granted tax exemption by the City (R.183-97), plus the Certificate of Incorporation of one of those organizations and the By-Laws of three others (R.198-224). This also appears to be the evidence relied upon by the court below in its holding on this issue.

There is, however, no testimony or other evidence in the Record from any representatives of these other organizations as to their programs and activities. There are no financial statements or other reports of any of these other organizations in the Record, by which one could determine how they spend their money. There are no calendars of events, by which one could determine the primary focus of their programs and activities. That is the evidence that would demonstrate that these organizations are truly charitable. It is not possible to determine the true purpose of an organization from its name alone, or even from its Certificate of Incorporation or By-Laws.

The case St. Joseph Health Center Properties, Inc. v. Srogi, 51 N.Y.2d 127, 130-33 (1980), held that an organization can qualify for tax exemption under RPTL 420-a if it is "organized or conducted" for exempt purposes. Thus, it is necessary to look at the actual conduct of the organization's activities, not simply at its organizational papers, in order to determine whether it qualifies for exemption.

The City has claimed that the Group 14621 Community Association, and the 19th Ward Community Association were granted exemption as "charitable" organizations because they used government funds to provide programs targeted to low-income persons and families (R.271). The court below had no basis for disputing that conclusion.

The City has in fact maintained a consistent practice of granting tax exemptions only to organizations that meet the recognized tests under the statute. The City has never granted an exemption to an organization whose primary focus was advocacy.

B. GAGV DOES NOT QUALIFY FOR TAX EXEMPTION UNDER RPTL 420-a.

In arguing that it is entitled to a tax exemption under RPTL 420-a, the GAGV states repeatedly what it believes the test for exemption is not: it is not, in the GAGV's view, the traditional test of "charitable" (free or subsidized services for the needy,

with donated or government funds); it is not the traditional test of "educational" (teaching, instruction or schooling); it is not the traditional test of "moral or mental improvement" (YMCA-type organization).

However, the GAGV never states what it believes the test is. When it attempts to articulate the test of "charitable", all it comes up with is a passage that uses the phrase "public usefulness", quoted from the cases Matter of MacDowell, 217 N.Y. 454, 460 (1916) and Church Home v. Wagner, 58 A.D.2d 972 (4th Dept. 1977) (Respondent's Brief, p.23-24).

However, it is quite clear that "public usefulness" is not and has never been the test for tax exemption under RPTL 420-a.[1] In the cases Association of the Bar of the City of New York v. Lewisohn, 34 N.Y.2d 143, 154 (1974) and Swedenborg Foundation, Inc. v. Lewisohn, 40 N.Y.2d 87, 95 (1976), the Court of Appeals stated clearly that "public benefit is not the test of qualification for exemption".

In many other cases as well, organizations that provided beneficial or useful services, organizations that thus met the test of "public usefulness", have been found by the courts not to

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[1]In fact, in the Church Home case, although the phrase "public usefulness" was cited, the actual test for exemption in that case was stated to be "encouraging, fostering, and protecting the rendering of health and nursing services to persons in genuine need of such care on a non-profit basis" (58 A.D.2d at 974).

qualify for exemption. Asia Society, Inc. v. Tax Commission, 92 A.D.2d 781 (1st Dept. 1983); Stuyvesant Square Thrift Shop, Inc. v. Tax Commission, 54 N.Y.2d 735 (1981); Delancey Street Foundation v. Board of Assessment Review, 112 A.D.2d 132 (2nd Dept. 1985) (drug rehab center); Bedford-Stuyvesant Restoration Corp. v. Lewisohn, 50 A.D.2d 815 (2nd Dept. 1975); Mount Tremper Lutheran Camp v. Board of Assessors, 70 A.D.2d 984 (3rd Dept. 1979); American Bible Society v. Lewisohn, 40 N.Y.2d 78 (1976); Genesee Hospital v. Wagner, 47 A.D.2d 37, aff'd 39 N.Y.2d 863 (1976); Good Will Club of Amsterdam v. City of Amsterdam, 31 Misc.2d 1096 (Sup.Ct. Montgomery Co. 1960); National Council of Jewish Women v. Board of Assessors, 21 Misc.2d 142 (Sup.Ct. Nassau Co. 1959); Independent Order of Odd Fellows, 283 App.Div. 199 (4th Dept. 1954).

If the GAGV wants to rely on the Symphony Space, Mohonk, and Botanical Garden cases as authority for a tax exemption for itself, it must at least state what new exemption category it believes those cases established, within which it fits.

In fact, in spite of the admittedly broad language in those cases, referring to "an assortment" of exempt purposes and promotion of the "public good", those cases created only one genuine expansion of exempt categories.

That consists of the category "environmental and

conservation", which encompasses the nature preserves in the three cases Mohonk, Botanical Garden, and North Manursing Wildlife Sanctuary v. Rye, 48 N.Y.2d 135 (1979). The Court of Appeals clearly did go beyond the traditional tax-exempt categories in declaring that this category would now be deemed to qualify for exemption. Its decision was not entirely without precedent, however, for it relied on the 1946 case Untermyer v. McGregor, 295 N.Y. 237. (Mohonk, 47 N.Y.2d at 484).

Since this new category was clearly beyond the listed statutory categories, perhaps it is not surprising that the court chose not to place it explicitly in any one of those existing categories, but instead to place it under a broad umbrella of the three categories "educational", "charitable", and "moral and mental improvement".

As we have noted before, although the Symphony Space decision reiterated some of the broad language of these nature preserve cases, the facts of that case did fit quite easily within the traditional "educational" category. Thus, aside from the nature preserve cases, which we believe must be regarded as sui generis, these four Court of Appeals cases from the period 1979 through 1983 did not really expand the concept of tax exemption.

If this court now is to find that the GAGV qualifies for tax

exemption, we believe the court must specifically find that the GAGV meets at least one of the tests of "educational", "charitable", or "moral or mental improvement", as set forth in the statute and in past cases. Certainly, if the GAGV meets two or more of those tests, it qualifies for exemption. However, if it falls short in all categories, then it should not be deemed to qualify for exemption.

We believe that the components of the GAGV's activities that were found by the court below to qualify it for exemption (R.16-22) do not in fact meet the tests. The so-called "educational" component of the GAGV's activities, "educating" the public about the needs and rights of gay people (R.20), does not meet the test of "educational"; that the so-called "charitable" component of its activities, providing peer counseling over the telephone and peer support groups (R.20), does not meet the test of "charitable"; and that the so-called "moral and mental improvement" component, fostering understanding between the heterosexual and homosexual communities (R.20,22), does not meet that statutory test.

C. COURT'S FINDING ON UNLAWFUL DISCRIMINATION ISSUE WAS PREMATURE.

As discussed in our initial brief, we believe the court below reached the issue of unlawful discrimination under 42 U.S.C. sec. 1983 prematurely.

In its brief, the GAGV hammers away at the "graphical and indisputable", "overwhelming, undisputed and irrefutable" evidence of such discrimination (Respondent's Brief, p.25,37). Yet this so-called "evidence" consists of the same few documents discussed above: a list of the names of organizations that have received tax exemptions from the City, and the Certificate of Incorporation or By-laws of four of those organizations (R.183-224). As discussed above, it is impossible to determine the characteristics of those organizations from their names or corporation documents alone. Thus, the court had no probative basis on which to conclude that the City had previously granted exemptions to organizations whose primary focus was advocacy.

Without that proof, and without some evidence of the intent or state of mind of City officials when they granted and denied the various exemptions, there is simply no basis for a finding of the requisite discriminatory intent.

The court had no basis for granting summary judgment on this issue, based solely on the limited documentary evidence before it.

Dated: November 19, 1993

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